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No. 91-1420

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOAN GROWE, SECRETARY OF STATE OF THE STATE OF MINNESOTA, ET AL.,

Appellants,

vs.

JAMES EMISON, ET AL.,

Appellees.

Appeal from the United States District Court
for the District of Minnesota

APPELLANTS' RESPONSE TO APPELLEES' MOTION TO DISMISS

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Appellees have moved this Court for an order dismissing the appeal of the judgment of the three-judge district court panel for the District of Minnesota which adopted legislative and congressional redistricting plans for Minnesota. The issues raised in the motion are fully and clearly addressed in the Jurisdictional Statement filed by appellants on March 6, 1992. The appellants submit this memorandum in opposition to appellants' motion to dismiss only for the purpose of replying to certain new matters raised in the motion. Appellants

respectfully request the Court to deny appellees' motion and to enter an order summarily reversing the judgment of the district court or noting probable jurisdiction.

I. THE FEDERAL COURT'S LEGISLATIVE REDISTRICTING PLAN SHOULD BE VACATED.

The federal court created its own legislative redistricting plan despite the prior judgment of the state court and despite the fact that Chapter 246 had only technical defects that could easily be remedied with minor clarifications and corrections. Its judgment should be reversed on several grounds.

A. Scott v. Germano Required the Federal Court To Defer to the State Court's Judgment.

Contrary to appellees' assertion, the clear and simple opinion in Scott v. Germano, 381 U.S. 407 (1965) (per curiam), does not indicate merely that courts should defer to legislatures in redistricting matters, but also that federal courts should defer to parallel state court actions. Id. at 409-10, Moreover, under Germano, a federal court certainly should not issue a redistricting plan which conflicts with an already issued state court plan.[1] The federal court in this case has consistently ignored these principles of comity. App. A-103, A-141, A-11.

[1] This principle was recently followed by the California federal redistricting panel which abstained from redistricting because of a parallel state court action. See Members of the Cal. Democratic Congressional Delegation v. Eu, No. C-91-3383 FMS, Opinion and Judgment of Dismissal (N.D. Cal., filed March 3, 1992).

In a contention that strains credulity, appellees assert that it is the state court, and not the federal court, that has violated Germano because the state court issued a legislative plan before the Legislature had acted. Motion to Dismiss, at 7-8. This contention is untenable and is not supported in the record. The state court issued its plan, subject to legislative action, only after the Legislature had enacted Chapter 246, the Legislature had indicated it would attempt to pass a technical corrections bill in January of 1992, and the governor submitted an affidavit stating he would veto any such bill. App. A-263-64. Given these facts, and the state court's desire to assist, not interfere with, the state election schedule, the state court's action was eminently reasonable and did not violate Germano.

Appellees also argue that the federal court did not need to defer to the state court because only the federal court could resolve all the issues raised by the parties in both actions. Motion to Dismiss, at 8-10. Appellees claim that the federal court was the only court presented with Voting Rights Act challenges. Appellees rely on allegations in the federal action that the 1982 legislative districts violated the Voting Rights Act. The 1982 districts, however, were never an issue in either case because they were obviously unconstitutional due to population shifts which had taken place.

The plan at issue in both cases was Chapter 246,[2] and no party in either the state or federal action ever alleged that Chapter 246 violated the Voting Rights Act. The parties did ask the state court to evaluate Chapter 246 to ensure that it satisfied the Voting Rights Act, and the state court, after receiving briefs and oral arguments from the parties, held that the law did not violate the Voting Rights Act. App. A-234, A-249.

Appellees deny that the state court had jurisdiction to resolve Voting Rights Act issues. Any claim of exclusive federal court jurisdiction over Voting Rights issues is belied by the principle that state courts are responsible for enforcing federal law. See Jurisdictional Statement at 9 n.2. As this Court recently stated in Howlett ex rel. Howlett v. Rose:

> Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

496 U.S. 356, 110 S. Ct. 2430, 2438 (1990). The state court's consideration of the Voting Rights Act in issuing its legislative

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[2] Appellees erroneously claim that the state court action involved no challenges to Chapter 246. Motion To Dismiss at 3. Counsel of record for appellees, Bruce Willis, represented intervening plaintiffs in the state action and signed their Complaint in Intervention on August 26, 1991, alleging that the districts created by Chapter 246 "do not meet constitutional and other legal requirements,"

redistricting plan was entirely proper in view of its affirmative obligation to enforce the federal law.[3]

B. The State Court Judgment Precluded the Federal Court from Issuing a Conflicting Redistricting Plan.

Appellees contend that the state court's legislative plan is not entitled to full faith and credit because appellants did not offer the plan to the federal court. Motion to Dismiss, at 11. That is incorrect. After this Court vacated the federal court's December 5, 1991, stay, the Cotlow appellants petitioned the federal court to reconsider its August 21, 1991, order and stay its hand with respect to both legislative and congressional redistricting, on the ground that the state court was proceeding expeditiously and had already completed a constitutionally valid plan of legislative redistricting. On February 11, 1992, the federal court denied the motion without comment. App. A-172. Hence, it is clear that the issue of the preclusive effect of the state court judgment was before the federal court at the time it declined to give any weight to the state court plan.

Appellees next argue that issue preclusion is inappropriate in this case because appellants fail to satisfy three of the four factors necessary for such preclusion. As regards the first factor, appellees argue that the issues in the federal and state court actions were not identical because there were no Voting

[3] The federal redistricting panel in California recently recognized the state court's concurrent jurisdiction over issues raised under Section 2 of the Voting Rights Act. See Members of the Cal. Democratic Congressional Delegation v. Eu, No. C-91-3383 FMS, Opinion and Judgment of Dismissal (N.D. Cal., filed March 3, 1992).

Rights Act allegations in the state court action. The Voting Rights Act issue in the federal action, however, pertained only to the 1982 legislative districts, a plan that the parties had stipulated was constitutionally invalid by the time the federal action was filed. Thus, the federal action's Voting Rights Act allegations are irrelevant. More importantly, the state court in fact considered and ruled on the Voting Rights Act issue. App. A-259. Similarly, the state court also considered and ruled on every challenge to Chapter 246, primarily by interpreting and modifying Chapter 246 to correct and/or eliminate the offending provisions.[4]

Appellees also contend that the second factor necessary for issue preclusion is lacking because the Benson plaintiffs were not present in the state court action. That the Benson plaintiffs technically were not present in the state court proceeding is irrelevant, because, as the appellees themselves note, the federal court found that "[t]hroughout this litigation, the Emison Plaintiffs and the Benson Plaintiffs, infra, have represented the interests of the Independent-Republican (IR) political party." Motion to Dismiss, at 1 n.1. Mr. Willis, the

[4] Significantly, appellees have avoided the issue of what remained in the federal court action with regard to legislative redistricting once the state court judgment was issued. The Emison plaintiffs' claims in the federal action related only to the 1982 districts and became moot once Chapter 246 was enacted. The Benson plaintiffs' claims in the federal action related only to the unconstitutionality of Chapter 246. Once the state court issued its own plan, curing the technical defects in Chapter 246, the claims in the federal action were moot. The federal court issued its order despite the lack of any unresolved claims before it.

Counsel of Record for appellees, has appeared in the state court case representing the Miller intervenors, see App. A-199, and in this case, representing the Emison plaintiffs,[5] as counsel for all Independent-Republican interests in the state. Indeed, the Miller intervenors in the state court action relied on their relationship with the state Independent-Republican party as one of the bases for their intervention.

In sum, the Benson appellees' interests were represented in the state court action, and thus those parties had a full and fair opportunity to participate in that case. That they refused to do so does not mean they lacked the opportunity. Therefore, issue preclusion under Minnesota law clearly bars the appellees from having a second bite at the legislative redistricting apple.

C. The Federal Court's Finding of a Voting Rights Act Violation Is Erroneous and Contrary to Law.

Appellees argue that the federal court properly addressed the Voting Rights Act claims which were "before it." In so arguing, they attempt to gloss over a glaring leap of logic in the federal court's Voting Rights Act analysis.

No party to this case has ever alleged that Chapter 246 or the state court's legislative redistricting plan violates the Voting Rights Act. The only Voting Rights Act claims made related to Minnesota's 1982 legislative districts. Those challenges were immaterial when made because the 1982 plan was

[5] The Benson appellees include the state's Independent-Republican legislative leadership, while the Emison appellees represent the state's Independent-Republican non-legislative leadership.

obviously unconstitutional in 1991 due to population shifts which had occurred. Any relevance the Voting Rights Act claims did have was obliterated when the 1982 districts were repealed by Chapter 246.[6]

The federal court attempted to bridge the gap between the irrelevant Voting Rights Act issues raised in the case and the lack of any challenges to the plan which was enacted or the plan which was adopted by the state court. It held that something, which it never identified, violated the Voting Rights Act and that neither Chapter 246 nor the state court's plan adequately "remedied" this defect. Appellees' claim that the federal court was required to reach a non-issue defies logic.

Appellees further fail to prop up the federal court's finding of a Voting Rights Act violation. Appellees merely cite to the federal court's "findings" without any meaningful legal explication and repeat the federal court's conclusion that in some unexplained way, Chapter 246 and the state court plan "perpetuate" these supposed violations. Motion to Dismiss, at 17-19. As fully explained in the Jurisdictional Statement, this "evidence" was not presented to the federal court by the parties, but was gathered by the court on its own and relied upon without an opportunity for the parties to comment upon it.

[6] Section 69 of Chapter 246 states "Minnesota Statutes 1990, sections 2.019 [and] 2.042 [through] 2.702, are repealed." The effectiveness of this section of Chapter 246 has never been contested since the Governor's attempted veto was declared to have been ineffective on August 2, 1991.

As regards the specific findings, appellees stress the lack of minority representation in the state legislature, Motion to Dismiss at 15, but fail to note that the Voting Rights Act does not require proportional representation. See 42 U.S.C. § 1973(b). Appellees also stress "recent" judicial findings of school segregation, Motion to Dismiss, at 16-17, but ignore the fact that the cited decisions are fifteen to twenty years old. Finally, appellees emphasize that the federal court found that Chapter 246 was designed to protect incumbents "apparently" at the expense of minority interests, id. at 17-18, without any supporting evidence. In sum, appellees simply do not meet the points raised in appellants' Jurisdictional Statement.[7]

D. The Federal Court Ignored State Law and Policy in Drawing Its Legislative Redistricting Plan.

Even if the federal court were free to ignore the state court judgment and even if the Voting Rights Act required a different senate district in Minneapolis, the federal court was required to incorporate to the fullest extent possible state law and policy. White v. Weiser, 412 U.S. 783 (1973); Upham v. Seamon, 456 U.S. 37 (1982) (per curiam). In this case, state law is contained in Chapter 246, and state policy is contained in

[7] Appellees do not even attempt to explain how the federal court's order can stand even on its own terms: The federal court based its finding of a Voting Rights Act violation on the need for a super-majority minority senate district in Minneapolis. The federal court's own plan, however, does not create a senate district where minority voters constitute a majority of voters in the district, even where all minorities are lumped together.

Chapter 246 as amended by Senate File 1596 and in the state court's legislative redistricting plan.[8]

Appellees attempt to justify the federal court's refusal to follow Chapter 246 in two ways. First, they contend that the court was not obligated to respect a redistricting plan which had constitutional or statutory defects. This argument simply misses the point of Weiser and Seamon. The doctrine set forth in these cases applies only where a redistricting plan has constitutional or statutory defects. Where a plan has no such defects, the court is not free to alter it at all.

Second, appellees argue that Chapter 246 was so defective that the federal court could not have adhered to it at all. This argument is patently groundless. Both the state court's plan and the technical corrections bill adopted by the Legislature, Senate File 1596, demonstrate how Chapter 246 can be cured of all its defects with minimal, technical changes. See App. A-249.[9] The federal court did not suggest, nor have the appellees suggested, that any constitutional defects exist in the state court's plan or in Senate File 1596.

In light of appellees' disingenuous characterization of the technical defects in Chapter 246, a fuller explanation of how

[8] Although appellees state that the federal court was not bound by Weiser or Upham to follow the state court plan, appellees submit no argument in support of that contention. See Motion to Dismiss at 22-26.

[9] Both the state court plan and Senate File 1596 are drafted in the form of amendments to Chapter 246 and show the minimal alterations made to the boundaries set forth in the law.

they arose and how they were readily cured is necessary. Errors arose in Chapter 246 primarily in the process of converting maps of the legislative redistricting plan into written boundary descriptions. The Revisor of Statutes, while doing excellent work, made a variety of mistakes in trying to ascertain the boundaries on the map and to describe them accurately. For example, certain boundary descriptions in Chapter 246 erroneously describe a line going "easterly" when it should go "westerly," and misspell or misidentify the names of streets, power lines, and other physical features, resulting in ambiguous district boundaries. In other instances, portions of townships which are surrounded by a separate city, "enclaves," were not joined with the same district as the city, resulting in discontiguous districts. In a couple of instances, cities were placed in two different districts, resulting in both double representation and population deviations.[10]

While these technical defects needed to be corrected, it was hardly an insurmountable task. Most of the defects were not constitutional and were cured through statutory construction. Moreover, nearly all of the districts could be cured consistent with legislative intent by reference to the maps which were used

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[10] The federal court's plans are still in map form. If they are converted to the form of written descriptions so that they can be easily distributed and used by the local election officials, the same types of problems that existed in Chapter 246 in May 1991 and were corrected over the following seven months will certainly arise in the federal court's plan. The state court plan, by contrast, simply corrected the defects in the written descriptions of Chapter 246 and therefore has already overcome this problem. See App. A-234, A-249.

by the legislators in committees, prior to the floor debates, and on the floor when the plan was adopted.

The state court made the minimal necessary corrections to cure these defects. Its order for judgment describes these changes and explains which ones were reached through statutory construction and which changes were necessary to cure constitutional defects. See App. A-265-354.[11]

Where the federal court had before it two plans which were patterned after Chapter 246, it was not free to ignore the law wholesale and create its own plan. Weiser stands for precisely this principle. 412 U.S. at 795. Chapter 246, the state court's plan, and Senate File 1596 all embody state policy to varying degrees. The federal court ignored all of this significant state policy and crafted a legislative redistricting plan of its own. The essence of the federal court's and appellees' justification of this incredibly intrusive action is that the federal court plan is simply "better" than the state court plan, using criteria not constitutionally or statutorily mandated, but more or less

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[11] Senate File 1596 also corrected these defects but further proposed numerous changes of clarification, consistency, and style which had no substantive impact on the plan. The reference by the federal court to these "160 changes" was made despite the clear explanations given by the Legislature regarding this fact.

chosen out of thin air.[12] Such judicial arrogance should not be countenanced and the federal court's decision should be reversed.

II. THE FEDERAL COURT'S CONGRESSIONAL REDISTRICTING PLAN SHOULD BE VACATED.

Two of the principles which require that the federal court's legislative redistricting plan be vacated also require that its congressional redistricting plan be vacated. First, Scott v. Germano required the federal court to defer to the state court on congressional redistricting. The federal court was aware that the state court intended to adopt a congressional plan once the Legislature failed to enact one. See App. A-249, A-359. The state court would have acted sooner but for the injunction which the federal court unlawfully imposed on the state court action from December 5, 1991, until relief was afforded by this Court on January 10, 1992.[13]

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[12] Appellees use the criterion of "compactness" primarily as a pretext to engage in an extended discussion of the dangers of gerrymandering. Motion to Dismiss, at 20-22. Such a discussion iscompletely superfluous, however, as the federal court noted that there was no showing of unconstitutional gerrymandering with respect to the state court plan or to Chapter 246 as amended. App. A-49-50.

[13] The federal court's February 19, 1992, order and judgment are similarly designed to give it continuing and exclusive jurisdiction over Minnesota redistricting through the next census, and presumably forever, by enjoining state election officials from conducting elections except as are consistent with the provisions of the order. App. A- 57-58. This bald attempt to exclude Minnesota state courts from addressing redistricting claims for the foreseeable future is an incredible breach of the principles of comity and should not be permitted to stand.

Appellees now argue that the state court "has indicated" it will not issue a congressional redistricting plan because of the federal court's plan. Motion to Dismiss, at 26-27. This is a gross mischaracterization of the state court's position. What the state court actually "indicated" on March 3, 1992, is clear: "Because Minnesota election officials are enjoined from accepting filings or conducting elections except as in accordance with [the federal court's] plan, we also decline to impose, at this time, an alternative plan. We are fully prepared to release a congressional plan if and when such a course of action becomes appropriate." App. A-446 (emphasis added).[14]

Second, the federal court was obligated to follow state policy to the extent possible. Weiser, 412 U.S. at 793-95. Appellees claim that Senate File 1597 does not constitute any evidence of state policy. Motion to Dismiss, at 26. Appellees are simply wrong. Id. at 795; see also Shayer v. Kirkpatrick, 541 F. Supp. 922, 932 (W.D. Mo.), aff'd sub nom. Schatzle v.

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[14] It is undisputed that the drawing of congressional districts is a state responsibility. The United States Constitution gives responsibility for drawing congressional district boundaries to state legislatures. Art. I, § 4. When a state legislature fails to adopt a congressional redistricting plan, state courts are urged, under the doctrine established in Scott v. Germano to adopt a plan. Numerous state courts have met this responsibility, California being the most recent example. E.g., Wilson v. Eu, No. S022835, 1992 WL 12071 (Cal. Jan. 27, 1992); Assembly v. Deukmejian, 30 Cal. 3d 638, 180 Cal. Rptr. 297, 639 P.2d 939, cert. denied and app. dismissed sub nom. Republican Nat'l Comm. v. Burton, 456 U.S. 941 (1982); Legislature v. Reineke, 6 Cal. 3d 595, 99 Cal. Rptr. 481, 492 P.2d 385 (1972); Koziol v. Burkhardt, 51 N.J. 412, 241 A.2d 451 (1968); People ex rel. Scott v. Kerner, 33 Ill. 2d 460, 211 N.E.2d 736 (1965).

Kirkpatrick, 456 U.S. 966 (1982); Donnelly v. Meskill, 345 F. Supp. 962, 964-65 (D. Conn. 1972); cf. Legislature v. Reinecke, 6 Cal. 3d 595, 99 Cal. Rptr. 481, 486-87, 492 P.2d 385 (1972). Where the federal court had before it a congressional plan adopted by the Legislature, that court was not at liberty to create its own plan.[15]

III. CONCLUSION

This Court has enunciated a clear rule on the subject of the jurisdiction of a federal panel in redistricting:· The instrumentalities of a state, including its legislature and courts, have jurisdiction to complete redistricting. Only if the state agencies fail may a federal court intervene, and then only to correct errors. The federal court has repeatedly ignored this rule to the harm of the People of the State of Minnesota. Minnesotans must not be compelled to conduct their 1992 elections within districts created through the usurpation of the constitutional authority of the state's legislature and its courts. The judgment below should be summarily reversed.

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[15] The federal court and appellees do recognize the principle that courts must be guided by state policy in redistricting. The only evidence of state policy which the federal court and appellees find acceptable, however, are the joint legislative resolutions establishing criteria for redistricting. These resolutions, one for congressional redistricting and one for legislative redistricting, were passed by both houses of the legislature but do not constitute state law because they were not enacted as bills and were not signed by the governor. The same deference accorded to these legislative pronouncements should have been accorded by the federal court to the congressional redistricting plan which was adopted by both houses of the Minnesota Legislature in 1992 session.

Immediate resolution of these issues is necessary to prevent further confusion and unnecessary expense and to ensure the timely implementation of the state electoral processes.

Dated: March 24, 1992

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